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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*, *Petitioners,*

—v.—

JAMES ABOUREZK, *et al.*, *Respondents.*

GEORGE P. SHULTZ, *et al.*, *Petitioners,*

—v.—

CITY OF NEW YORK, *et al.*, *Respondents.*

GEORGE P. SHULTZ, *et al.*, *Petitioners,*

—v.—

BRUCE CRONIN, *et al.*, *Respondents.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

Cases iii

Administrative Decisions v

Statutes, Regulations and Treaties v

Legislative History vi

Other Authorities vii

INTRODUCTION 1

THE STATUTORY FRAMEWORK 1

STATEMENT OF THE CASE 2

A. *Shultz v. Cronin* 2

B. *Reagan v. Abourezk* 4

C. *Shultz v. City of New York* 5

D. *The District Court* 8

E. *The Court of Appeals* 9

SUMMARY OF ARGUMENT 12

ARGUMENT 13

I. THE VISA DENIALS CHALLENGED IN THIS CASE CANNOT BE JUSTIFIED UNDER § 212(a)(27) ABSENT ANY ALLEGATION THAT THE EXCLUDED SPEAKERS ARE LIKELY TO ENGAGE IN PREJUDICIAL "ACTIVITIES" IF ADMITTED TO THE UNITED STATES 13

PAGE

A. *Plain Language of the Statute* 14

B. *Statutory Context* 16

C. *Legislative History* 18

D. *Administrative Construction* 23

E. *Case Law* 30

F. *Congressional Intent* 31

II. THE McGOVERN AMENDMENT PROHIBITS THE USE OF § 212(a)(27) TO EXCLUDE FOREIGN SPEAKERS BASED ON THEIR MEMBERSHIP IN PROSCRIBED ORGANIZATIONS. 33

III. THE LANGUAGE OF § 212(a)(27) SHOULD BE NARROWLY CONSTRUED TO AVOID THE FIRST AMENDMENT PROBLEMS INHERENT IN THE GOVERNMENT'S BROAD APPLICATION OF THE STATUTE IN THIS CASE 40

CONCLUSION 46

TABLE OF AUTHORITIES

Cases PAGE

Allende v. Shultz, 605 F.Supp. 1220 (D.Mass. 1985)..30, 35, 41

Board of Education v. Pico, 457 U.S. 853 (1982)..... 43

Brandenburg v. Ohio, 395 U.S. 444 (1969)..... 15

Carey v. Brown, 447 U.S. 455 (1980)..... 42

Cantwell v. Connecticut, 310 U.S. 296 (1940)..... 43

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).....23, 24

Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980).....14, 18

Dickman v. Commissioner of Internal Revenue, 465 U.S. 330 (1983)..... 32

El-Werfalli v. Smith, 547 F.Supp. 152 (S.D.N.Y. 1982) ...18, 31

Erlenbaugh v. United States, 409 U.S. 239 (1972)..... 16

Haig v. Agee, 453 U.S. 280 (1981)..... 30

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)..... 33

Harisiades v. Shaughnessy, 342 U.S. 580 (1952)..... 44

Healy v. James, 408 U.S. 169 (1972)..... 45

Hynes v. Mayor of Oradell, 425 U.S. 610 (1980)..... 43

INS v. Cardoza-Fonseca, ____ U.S. ____, 55 U.S.L.W. 4313 (March 9, 1987).....*passim*

INS v. Chadha, 462 U.S. 919 (1983)..... 16

Japan Whaling Association v. American Cetacean Society, 106 S.Ct. 2860 (1986).....24, 25, 40

Kent v. Dulles, 357 U.S. 116 (1958)..... 12, 29, 30

PAGE

Kleindienst v. Mandel, 408 U.S. 753 (1972) ..... *passim*

Kolender v. Lawson, 461 U.S. 352 (1983) 8

Lamont v. Postmaster General, 381 U.S. 301 (1965) ... 42

Largent v. Texas, 318 U.S. 418 (1941) 43

Lovell v. Griffin, 303 U.S. 444 (1938) 43

Mills v. Alabama, 384 U.S. 214 (1966) 46

Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) 32

New York Times v. Sullivan, 376 U.S. 254 (1964) 1

Niemotko v. Maryland, 340 U.S. 258 (1951) 43

Police Department v. Mosley, 408 U.S. 92 (1972) 42, 43

Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268 (1980) 32

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) .35, 42

Regan v. Time, Inc., 468 U.S. 641 (1984) 42

Regan v. Wald, 468 U.S. 222 (1984) 44

Russello v. United States, 464 U.S. 16 (1983) 17

Schneider v. State, 308 U.S. 147 (1939) 43

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 43

Staub v. City of Baxley, 355 U.S. 313 (1958) 43

Tennessee Valley Authority v. Ashwander, 297 U.S. 288 (1936) 12

Terminiello v. Chicago, 337 U.S. 1 (1949) 15

Thomas v. Collins, 323 U.S. 516 (1945) 43

Touche Ross & Co. v. Reington, 442 U.S. 560 (1979) . 14

PAGE

United States v. O'Brien, 391 U.S 376 (1968) 44

United States v. Reynolds, 345 U.S. 1 (1953)..... 40

Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976)..... 42

Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609 (1973) 17

Widmar v. Vincent, 454 U.S. 263 (1981)..... 45

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 1

Administrative Decisions

In Re Margaret Jo Randall, No. All 644 708 (Executive Office for Immigration Review, Aug. 28, 1986) 7

Matter of M—, 5 I. & N. Dec. 248 (BIA 1953).....25, 26

Matter of McDonald and Brewster, 15 I. & N. 203 (BIA 1975)..... 26

Matter of Rivero-Diaz, 12 I. & N. 475 (BIA 1967) 26

Matter of Zamora, unreported, No. A-105 50 431 (BIA March 11, 1958)..... 26

Statutes, Regulations and Treaties

Act of June 20, 1941, Pub. L. No. 113, 55 Stat. 251 ..19, 20, 21, 22

Act of June 21, 1941, Pub. L. No. 114, 55 Stat. 251 ... 22

Act of May 25, 1948, Pub. L. No. 552, 62 Stat. 268 ... 21

Conference on Security and Co-operation in Europe: Final Act (Aug. 1, 1975), 14 I.L.M. 1292 (1975) (Helsinki Accords).....13, 33

PAGE

Immigration and Nationality Act of 1952
§ 103(a), 8 U.S.C. § 1103(a) 25
§ 212, 8 U.S.C. § 1182 1
§ 212(a), 8 U.S.C. § 1182(a) 9, 27
§ 212(a)(2), 8 U.S.C. § 1182(a)(2)..... 17
§ 212(a)(5), 8 U.S.C. § 1182(a)(5)..... 17
§ 212(a)(12), 8 U.S.C. § 1182(a)(12)..... 17
§ 212(a)(13), 8 U.S.C. § 1182(a)(13)..... 17
§ 212(a)(27), 8 U.S.C. § 1182(a)(27) .....*passim*
§ 212(a)(28), 8 U.S.C. § 1182(a)(28) .....*passim*
§ 212(a)(29), 8 U.S.C. § 1182(a)(29) 1, 17, 18
§ 212(a)(33), 8 U.S.C. § 1182(a)(33)..... 28
§ 212(d)(3), 8 U.S.C. § 1182(d)(3) 1, 34
§ 212(f), 8 U.S.C. § 1182(f) 32, 33, 37, 38
§ 215, 8 U.S.C. § 1185(a)(1) 33, 38

Internal Security Act of 1950, Pub. L. No. 831, 64 Stat. 987 .....19, 20, 22

McGovern Amendment
22 U.S.C. § 2691.....*passim*

Refugee Act of 1980
8 U.S.C. § 1101(a)(42) 23

Legislative History

S. Rep. No. 386, 77th Cong., 1st Sess. (1941) 21

H. R. Rep. No. 1286, 80th Cong., 2d Sess. (1948)..... 22

S. Rep. No. 1199, 80th Cong., 2d Sess. (1948) 22

H. R. Rep. No. 3112, 81st Cong., 2d Sess. (1950) 20

S. Rep. No. 2230, 81st Cong., 2d Sess. (1950)..... 19

S. Rep. No. 2369, 81st Cong., 2d Sess. (1950)..... 19

H. R. Rep. No. 1365, 82d Cong., 2d Sess. (1952).....19, 25

S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 19

PAGE

S. Rep. No. 95-194, 95th Cong., 1st Sess. (1977) 45

S. Rep. No. 95-842, 95th Cong., 2d Sess. (1978).....34, 36

96 Cong. Rec. 14172-73 (1950) 20

96 Cong. Rec. 14179 (1950) 20

96 Cong. Rec. 14441-42 (1950) 20

96 Cong. Rec. 14551-52 (1950) 20

123 Cong. Rec. 26536 (1977) 36

Other Authorities

Executive Order 12172, 44 Fed. Reg. 67947 (1979) 33

Executive Order 12206, 45 Fed. Reg. 24101 (1980) 33

Foreign Affairs Manual, Pt. II (1975) 27

Gordon and Rosenfeld, 6 *Immigration Law and Procedure* (1983) 27

Memorandum on Technology Transfers under the Immigration and Nationality Act, Department of Justice (March 1, 1982) 29

1 Op. Off. Legal Counsel 64 (1977) 28

Presidential Proclamation No. 2523, 6 Fed. Reg. 5821 (1941) 22

Presidential Proclamation No. 5377, 50 Fed. Reg. 41329 (1985) 37

Shapiro, "Ideological Exclusions: Closing the Border to Political Dissidents," 100 Harv.L.Rev. 930 (1987).... 41

The New York Times, November 30, 1983 5

United Nations Security Council Resolution 253 (May 29, 1968) 28

Washington Post, December 3, 1983 5

INTRODUCTION

The issue in this case is whether § 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27), authorizes the exclusion of foreign speakers from the United States based on their political affiliations or the anticipated content of their political speech before American audiences.

By their very nature, such ideological exclusions call into question our national commitment to the principle "that debate on public issues should be uninhibited, robust and wide-open . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). At a minimum, therefore, they cannot be sustained absent clear evidence of congressional intent. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Because such evidence is lacking in this record, the decision below should be affirmed.

THE STATUTORY FRAMEWORK

Section 212 of the Immigration and Nationality Act defines 33 categories of excludable aliens. Section 212(a)(27), the provision most directly at issue here, bars the admission of any alien "who seek[s] to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Its proscriptions are absolute and cannot be waived.

Section 212(a)(28), 8 U.S.C. § 1182(a)(28), bars aliens who advocate communism or are affiliated with communist organizations. Unlike (a)(27), its provisions can be waived by the Attorney General. 8 U.S.C. § 1182(d)(3). Indeed, in 1977, Congress adopted the so-called McGovern Amendment, 22 U.S.C. § 2691, which states that the Secretary of State "should" recommend a waiver in (a)(28) cases unless Congress is formally notified that national security is at stake.

Section 212(a)(29) of the Act, 8 U.S.C. § 1182(a)(29), requires the exclusion of any alien likely to engage in espionage, sabotage, or acts calculated to achieve the forcible

overthrow of the United States government. It, too, cannot be waived.

STATEMENT OF THE CASE

The proceedings in this Court represent a consolidation of three separate actions in the district court. Although litigated and decided together, each arose in a unique factual context as described below.

A. *Shultz v. Cronin*

The question of nuclear disarmament is, without doubt, one of the most vital issues facing the country today. On October 23, 1983, two respondents in this action—the New England Campaign to Stop the Euromissiles and Mobilization for Survival—planned a rally in Boston to protest the placement of American Pershing missiles in Europe. The rally was scheduled to coincide with similar demonstrations here and abroad.

Nino Pasti was an invited speaker at that rally. Mr. Pasti is an acknowledged expert on nuclear weapons and nuclear disarmament. He developed that expertise as a four star general in the Italian Air Force and as the Italian Military Representative to the NATO Military Committee. From 1963-66, Mr. Pasti was stationed at the Pentagon and worked with the United States Defense Department on a wide range of military issues. In 1966, Mr. Pasti became Vice-Supreme Allied Commander in Europe for Nuclear Affairs. He left the military in 1969 upon reaching the mandatory retirement age. From 1976-83, Mr. Pasti served as a member of the Italian Senate. He is currently president of an Italian organization named Struggle for Peace ("Lotte per la Pace"), and editor of its monthly magazine entitled Struggle for Peace and Disarmament ("Lotte per la Pace et il Disarme"). J.A. 104-5.

Mr. Pasti has frequently travelled to the United States and has received at least five previous visas from the United States government. On or about September 8, 1983, he applied to the American Embassy in Rome for a visa to attend and speak at the disarmament rally in Boston on October 23. J.A. 105-6.

After questioning Mr. Pasti about his political associations, the consular officer initially determined that Mr. Pasti was excludable from the United States under (a)(28). Following State Department procedure, a telex was then sent to Washington regarding a possible waiver. In response, the State Department directed Mr. Pasti's exclusion under (a)(27). Pet. App. 5a.

At the time, Mr. Pasti was not given any explanation for his exclusion other than a statutory citation to (a)(27). Subsequently, the State Department revealed its concern that, if admitted to the United States, Mr. Pasti would speak out against the deployment of American missiles in Europe and thereby further the propaganda aims of the Soviet Union during "a particularly delicate period for United States foreign policy." Pet. App. 94a. The government reached this conclusion based on Mr. Pasti's membership in the World Peace Council (WPC). Pet. App. 92a-93a. Indeed, the State Department decided in 1982 to prohibit all members of the WPC from entering the United States "except in limited circumstances," Pet. App. 93a, because of its conclusion that the WPC is "controlled and financed" by the Soviet Union. Pet. App. 92a. Mr. Pasti was apparently excluded pursuant to that general policy.[1]

Mr. Pasti's inability to obtain an American visa deprived the sponsors of the Boston disarmament rally and those who attended it from hearing the informed views of a respected critic of American nuclear policy. Respondents remain anxious to meet with him whenever he can obtain the necessary visa. Mr. Pasti, in turn, has informed respondents of his willingness to accept their invitation whenever the United States government permits him to travel to America. J.A. 106.

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1 The explanation for Pasti's exclusion is contained in an affidavit by Lawrence S. Eagleburger, then Under Secretary of State for Political Affairs, which was initially reviewed *in camera* by the district court. Pet. App. 78a-80a. After the Court of Appeals expressed its "grave concern" with this procedure, Pet. App. 30a-32a, the Eagleburger affidavits were declassified in all three cases (with two minor exceptions) and provided to respondents. Brief for Petitioners at 6 n.3.

B. *Reagan v. Abourezk*

The policies pursued by the current administration toward the government of Nicaragua have been a major source of public controversy in the United States for the past several years. That controversy is ongoing.

In the fall of 1983, a group of Americans anxious to learn more about events in Central America generally, and Nicaragua specifically, invited Tomas Borge, Nicaragua's Interior Minister, to come to the United States for a five day speaking tour. Despite different backgrounds, perspectives and interests, each of the inviters shares a common goal—the wish to meet face-to-face with a person whose knowledge and experience of Central American affairs cannot be disputed.

For example, Mr. Borge was invited to Washington by Congressmen Edwards and Schumer, who hoped to gain a perspective on Nicaragua from Mr. Borge that was not readily available from domestic sources.[2] Mr. Borge was also invited to meet with a variety of professors, journalists, businessmen and community leaders throughout the United States.

Having accepted these invitations, Mr. Borge applied for a non-immigrant visa on or about November 15, 1983. He informed the United States Embassy in Managua that he intended to visit the United States in December, and that the purpose of his trip was to engage in the speaking tour that had been arranged for him by the respondents in this case. J.A. 95.

Only a few months earlier, Mr. Borge had been told by American government officials that he would be granted a visa to enter the United States for a speaking tour. *Id.* Nevertheless, when he actually applied for a visa in November 1983, his request was denied under § 212(a)(27). J.A. 90.

Neither Mr. Borge nor any of the respondents was ever officially informed of the reason for the visa denial. However, Secretary of State Shultz was quoted as saying that while he ordinarily favored freedom of speech, "it can get abused by

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2 At the time the complaint was filed in *Abourezk*, two other plaintiffs were serving in Congress: Paul Tsongas in the Senate and James Shannon in the House of Representatives.

people who do not wish us well."[3] In a similar vein, an unnamed White House official stated that "the government did not want to give Mr. Borge a propaganda platform in the United States."[4] This theme was amplified by Under Secretary of State Eagleburger who stated that the admission of Mr. Borge would have sent a "wrong message" to our allies and "could have" affected the Contadora negotiations concerning Nicaragua depending on the nature of Mr. Borge's comments in the United States. Pet. App. 87a.[5]

Because the question of American policy toward Nicaragua remains very much alive on the national agenda, each of the respondents has expressed an ongoing desire to meet with Mr. Borge whenever possible.

C. *Shultz v. City of New York*

The Commission on the Status of Women was established by New York City in 1975 as a forum on women's issues. Pursuant to its mandate, the Commission invited Olga Finlay and Leonor Rodriguez Lezcano to New York in September 1983. Ms. Lezcano is an expert on the status of black women in Cuba. J.A. 101-2. Ms. Finlay is an attorney who has written extensively on family law issues. J.A. 101-2. Both women are members of the Federation of Cuban Women. *Id.*

The invitation extended to Ms. Finlay and Ms. Lezcano by the New York City Commission was part of a larger speaking tour. Ms. Finlay and Ms. Lezcano were also invited to speak at a series of universities and public meetings across the country. Shortly after receiving these invitations, Ms. Finlay and Ms. Lezcano applied to the United States Interest Section in Havana for an American visa. On their applications, they indicated the general purpose of their visit and that they intended to remain in the United States for only a brief stay. Their applications were denied pursuant to § 212(a)(27). J.A. 92.

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3 *Washington Post*, December 3, 1983, at A12.

4 *The New York Times*, November 30, 1983, at A11.

5 *See* n.1, *supra*.

Ms. Lezcano has travelled to the United States on one prior occasion. J.A. 102. Ms. Finlay lived in the United States for fifteen years as a child. Since she returned to Cuba in 1961, she has been in the United States on numerous occasions to attend conferences and fulfill speaking engagements. Prior to the events that led to this case, she was never informed by United States officials that her presence in the United States was prejudicial to the public interest. J.A. 98.[6]

Concerned about the inability of Ms. Finlay and Ms. Lezcano to obtain visas from the United States government, various respondents, including the Institute for Policy Studies and Thomas Holloway of Cornell University, sought an explanation from the State Department. In response to their inquiries, they were informed that the decision had been based upon a determination that the proposed visit of Finlay and Lezcano to engage in a speaking tour "would have been prejudicial to the public interest by providing these two officials with forums for propagating Cuban policies before United States audiences." The State Department added that any future applications by the two women "will be considered in light of the intended purpose of their visit," noting that "visits which are primarily for sport or cultural purposes are exempted" from the restrictions that apparently apply to speaking tours.[7]

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6 In December 1983, Ms. Finlay was granted a visa to attend a meeting of the Pan American Health Organization in Washington, D.C. Because this visa was granted only a few months after Ms. Finlay's prior application was denied, the government has suggested that the visa denial challenged in this case had little impact and was not content-related. The government fails to mention the visa restrictions imposed on the December 1983 trip. Specifically, Ms. Finlay was advised that she was not permitted to leave the Washington area for any purpose, and that she could only participate in the single meeting for which her visa was issued. Accordingly, Ms. Finlay was obliged to decline a renewed invitation to speak at the Institute for Policy Studies, and was unable even to meet with respondents' counsel to discuss the present action. J.A. 99.

7 Letter from Kenneth W. Skoug, Jr. to Thomas H. Holloway, attached to the Declaration of Thomas H. Holloway (C.A. App. A239).

The now-declassified Eagleburger affidavit[8] is not appreciably more specific. After noting that the Federation of Cuban Women is headed by a Cuban Communist Party official, it notes that the Cuban government "routinely employs people *like* Finlay and Lezcano" to encourage Americans "to accept a positive image of the Cuban Revolution and Cuban society." Pet. App. 89a-90a (emphasis added). The affidavit does not say that Ms. Finlay and Ms. Lezcano were *in fact* employed for this purpose in September 1983 or that the government even believed that to be their purpose in travelling to this country.[9]

The speaking tour planned for Ms. Finlay and Ms. Lezcano was, of course, cancelled when they were barred from entering the United States. The damage caused to debate and discussion within the United States by that cancellation is described in respondents' declarations. As explained, for example, by Thomas Holloway, director of Cornell's Latin American Studies program:[10]

> Given the particular backgrounds and expertise of these two women, a presentation by them in person, followed by discussion and dialogue with members of the Cornell community, is essential to the purpose of our visiting speakers program. Under our standard procedures and guidelines, in keeping with the principles of academic freedom, exchange of ideas, and open debate, learning of the views of these speakers through impersonal means is an inadequate substitute for face-to-face contact. Speakers are not invited to deliver information to a passive audience, but to raise issues for discussion. Such a purpose can only be fulfilled by bringing speakers and audiences together in direct, personal contact.

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8 *See* n.1, *supra*.

9 The government also fails to note that an immigration court recently rejected its contention that the Federation of Cuban Women is an arm of the Cuban government. *See In re Margaret Jo Randall*, No. A11 644 708 (Executive Office for Immigration Review, Aug. 28, 1986). A copy of this decision has been lodged with the Clerk for this Court's convenience.

10 C.A. App. A237.

Each of the respondents has suffered a similar loss, although each did not necessarily wish to discuss precisely the same issues with Ms. Finlay and Ms. Lezcano. For example, David Rudstein, a law professor, dean, and expert on criminal justice, looked forward to a discussion about the rights of juveniles and blacks in the Cuban legal system. Those subjects are not adequately described in the available literature. More importantly, as Dean Rudstein notes, "a Socratic dialogue with a piece of paper cannot take place."[11]

The invitations to Ms. Finlay and Ms. Lezcano remain open. Both women are anxious to speak in the United States as soon as our government will permit them. J.A. 100, 103.

D. The District Court

The complaints in this case were filed in December 1983. On March 1, 1984, the government moved to dismiss or, in the alternative, for summary judgment. Following an oral argument at which government counsel claimed that the executive branch could, if it wished, exclude foreign speakers for the purpose of limiting public debate within the United States,[12] the district court issued its decision on July 27, 1984. Pet. App. 65a-80a.

The government's threshhold claims were rejected by the district court, which found jurisdiction and standing. *Id.* at 70a. It also found that the case was not moot. Citing this Court's decision in *Kolender v. Lawson*, 461 U.S. 352 (1983), the district court ruled that "in view of the government's broad defense of its actions, [respondents] have every reason to fear that the allegedly unlawful activity will continue." *Id.* at 71a.

Turning to the merits, the district court acknowledged that respondents' statutory arguments were "not unpersuasive." *Id.* at 72a. Specifically, the district court agreed that the government's actions in this case could not be upheld if the language of § 212(a)(27) were read on "a strictly textual basis." *Id.* The district court declined to adopt a "textual" interpretation, however. Instead, the district court held that Congress must

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11 C.A. App. A272-73.

12 Transcript of district court proceedings, dated July 2, 1984, at 58-60.

have intended (a)(27) to be applied more broadly than it was written. The district court therefore held that (a)(27) could be applied in this case, despite the lack of a finding by either the district court or the government that any of the excluded foreign speakers was likely to engage in prejudicial "activities" if admitted to the United States.[13]

E. The Court of Appeals

On appeal, a divided panel reversed and remanded for further proceedings in the district court. Pet. App. 1a-64a.[14] The majority opinion rests on two related but distinct holdings.

First, the court ruled that the government had not established on the present record that the statutory reference in (a)(27) to prejudicial "activities" was meant to apply to an alien whose "entry" or "presence" in the United States was deemed prejudicial by government officials. In reaching this conclusion, the majority began with the language of the statute itself, noting that the "specific reference to activities would be superfluous, indeed, misleading, if entry or presence alone could justify exclusion." *Id.* at 16a. As the majority observed, "the plain thrust of the language of subsection (27) . . . weigh[s] heavily against the government's reading." *Id.*

In addition, the majority noted that the language of (a)(27) is reinforced by the context in which it appears. Specifically, the 33 categories of exclusion set forth in § 212(a) of the Act distinguish between exclusions based on status and exclusions based on conduct. Judged in those terms, the majority concluded that (a)(27) must be regarded as conduct-based, espe-

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13 The district court also held that "an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of the content of his proposed message." *Id.* at 77a. The district court was persuaded, however, by its *in camera* review of the Eagleburger affidavits that the government had acted in this case for content-neutral reasons. *Id.* at 80a. The inherent unfairness of this *ex parte* procedure was strongly noted by the Circuit Court. *See* n.1, *supra.*

14 The panel unanimously affirmed the district court's ruling on jurisdiction, standing and mootness. Pet. App. 8a-13a, 35a. Petitioners do not seek review of those rulings in this Court.

cially when juxtaposed against the status-based language of (a)(28). Applying traditional principles of statutory construction, the majority ruled that this distinction was significant. "Congress' undoubted ability to draft categories based only on status, when that is the legislature's intention, strengthens the inference that the words 'to engage in activities' contained in subsection (27) were not put there inadvertently." *Id.* at 16a-17a.

The majority next examined the legislative history and found that "it tugs in more than one direction." *Id.* at 17a. Likewise, the majority concluded that the "meager evidence" offered by the government of its past practice under (a)(27) was insufficient to "demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence." *Id.* at 21a. Rather than reject the government's interpretation outright, however, the majority remanded to permit the government to offer additional evidence on this point. *Id.* at 22a. The government chose not to take advantage of that opportunity and instead has petitioned directly to this Court.

The decision below also rested on the majority's interpretation of the McGovern Amendment and the light it sheds on the statutory relationship between (a)(27) and (a)(28). Recognizing that the McGovern Amendment was adopted by Congress to restrict exclusions based solely on political affiliation, the majority noted that "[i]f the government could use subsection (27) to exclude aliens whose entry might threaten our foreign policy objectives simply because of their membership in Communist organizations, then subsection (28) would be made superfluous and the congressional will expressed in the McGovern Amendment will be nullified." *Id.* at 23a. Thus, the majority held that even if (a)(27) embraces entry or presence, its invocation must still be based on something other than an alien's membership in an organization proscribed by (a)(28) and correspondingly covered by the McGovern Amendment. Pet. App. 24a.

The majority expressed this thought by stating that an alien's exclusion under (a)(27) must be based on some reason "independent of" organizational membership under (a)(28). *Id.*

However, the essence of its holding is that the finding of prejudice required by (a)(27) must be based on specific information about a specific individual and not premised on a notion of guilt by association with a proscribed organization. On this ground, as well, the majority remanded for further clarification of the government's position.[15]

Judge Bork dissented. Although agreeing that "[h]ad we nothing before us but the language of the statute . . . I might be inclined to adopt the construction proposed by [respondents]," *id.* at 42a, his opinion concludes that the legislative history of (a)(27) and its predecessor statutes demonstrates a congressional intention to bar aliens whose entry or presence in the United States might be deemed prejudicial even in the absence of any reason to believe that they will, in fact, engage in prejudicial activities. *Id.* at 38a.

Likewise, Judge Bork agreed with the majority that (a)(27) and (a)(28) must be read together and that the McGovern Amendment must be given effect. *Id.* at 53a. He further agreed that the McGovern Amendment prohibits exclusions based on a "generalized . . . distrust of communist organizations, and that (a)(27) cannot be used to circumvent that prohibition." *Id.* Unlike the majority, however, he concluded that the government's allegations in this case were consistent with the terms of the McGovern Amendment and thus could be upheld. *Id.* at 50a-52a.[16]

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15 Given its statutory ruling, the majority expressly declined to reach respondents' constitutional claims. *Id.* at 30a.

16 In further contrast to the majority, Judge Bork reached and rejected respondents' constitutional claims. *Id.* at 60a-63a.

SUMMARY OF ARGUMENT

The decision to bar a foreign speaker from the United States for ideological reasons necessarily "implicate[s]" core First Amendment values. *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). This is especially so when the government openly acknowledges its desire to avoid granting "legitimacy" to "hostile" political viewpoints by denying American visas to representatives or spokesmen of opposing political views.

Precisely because the constitutional issues raised by this case are so significant, and made more so by the virtually unlimited reach of the government's claimed authority, the statutory language relied on by the government to justify its actions must be closely scrutinized to respect congressional intent, avoid unnecessary constitutional adjudication, *see Tennessee Valley Authority v. Ashwander*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), and forestall unintended infringements of First Amendment freedoms, *see Kent v. Dulles*, 357 U.S. 116 (1958).

Here, the plain language, statutory context, legislative history and contemporaneous administrative construction of § 212(a)(27) all point to a single conclusion. In enacting (a)(27), Congress was concerned about avoiding the likelihood of prejudicial "activities" within the United States by foreign visitors. The statute does not, therefore, authorize a denial based on a speaker's lawful political views or a foreigner's mere presence in the United States to express those views.

Nor may a finding of prejudice under (a)(27) be based on generalized assumptions about a speaker's political associations. Even assuming that "entry" or "presence" are appropriate criteria under (a)(27), the perceived prejudice flowing from entry or presence cannot be based on considerations of status more appropriately addressed under (a)(28). Otherwise, the safeguards embodied in the McGovern Amendment, 22 U.S.C. § 2691, will be effectively nullified and the congressional effort to ensure

greater "compliance" with the Helsinki Accords will have been frustrated by administrative action.

Finally, the additional inquiry into congressional intent contemplated by the Court of Appeals will not, as the government erroneously asserts, thrust the judiciary into sensitive foreign policy judgments. The terms of the remand are narrowly focused on two legal questions, which need not ever be reached if this Court agrees that the government's interpretation of (a)(27) is plainly incorrect on the present record.

First, the government has been asked to provide further evidence of past administrative practice under (a)(27) to support its claim of congressional acquiescence in what even Judge Bork concedes is a strained construction of the statutory language. Having initiated this process itself, the government is hardly in a position to complain about its fair completion.

Second, the district court has been directed to reexamine the government's proffered explanation for the visa denials in this case in light of the McGovern Amendment, and to determine whether those denials were based on anything more than the principle of guilt by association rejected by Congress when it adopted the McGovern Amendment. No further discovery is necessary to accomplish this quintessential judicial task.

ARGUMENT

I. THE VISA DENIALS CHALLENGED IN THIS CASE CANNOT BE JUSTIFIED UNDER § 212(a)(27) ABSENT ANY ALLEGATION THAT THE EXCLUDED FOREIGN SPEAKERS ARE LIKELY TO ENGAGE IN PREJUDICIAL "ACTIVITIES" IF ADMITTED TO THE UNITED STATES

Given the obvious and significant constitutional implications of the present controversy, it is important to define as precisely as possible the narrow statutory question raised by this case. The issue before this Court is not whether "the entry of [these]

particular alien[s] at this particular time would prejudice the foreign policy interests of the United States," as the government asserts in its affidavits. Rather the issue is whether a visa denial based on that judgment was authorized by Congress when it enacted § 212(a)(27) of the Immigration and Nationality Act. *See INS v. Cardoza-Fonseca*, ____ U.S. ____, 55 U.S.L.W. 4313 (March 9, 1987).

The government merges these very separate inquiries in its brief by arguing that (a)(27) cannot possibly mean what it quite clearly says or else it would be impossible to deal with the kind of situation created when the late Shah of Iran sought admission to the United States. This process of legislative reconstruction through a worst case scenario is wrong for two reasons. First, it ignores the fact that the potential problems foreseen by the government can be handled under other provisions of the Immigration and Nationality Act without distorting the meaning of § 212(a)(27). Second, and more fundamentally, it is not the role of the courts or the executive branch to rewrite an Act of Congress in order to make it work better or more efficiently. If there are flaws in the statute, they are for Congress to correct.

Applying traditional methods of statutory construction, the interpretation of § 212(a)(27) urged by the government cannot be sustained. As demonstrated below, it is an interpretation unmoored in text, history, context or past administrative practice.

A. Plain Language Of The Statute

This Court has often emphasized that questions of statutory construction "must begin with the language of the statute itself." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4316. Indeed, "[a]bsent a *clearly expressed* legislative interpretation to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980) (emphasis added); *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4316 n.12.

The language of § 212(a)(27) is admittedly broad, but not all encompassing. It renders ineligible for an American visa, any alien

> who the consular officer or the Attorney General knows or has reason to believe seeks to enter the United States solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.

The government has never alleged in this case that any of the excluded foreign speakers seeks to enter the United States to engage in prejudicial "activities" of any sort, and the record plainly demonstrates that they do not. Instead, the government has argued that the mere "entry" or "presence" of these foreign speakers in the United States might prejudice American interests.

The distinction between "entry" or "presence," on the one hand, and "activities," on the other, is hardly a subtle one. That is especially so once it becomes apparent, as it has in this case, that the "entry" or "presence" of a foreign speaker in the United States is opposed by the government because of the speaker's political beliefs or associations. There is no more fundamental distinction in American constitutional law than the distinction between beliefs and activities. *E.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949). Had Congress intended § 212(a)(27) to extend beyond prejudicial "activities" to authorize exclusion on the basis of belief or status, it would have done so explicitly, as it did in enacting § 212(a)(28).

For understandable reasons, the government's brief largely ignores the language of the statute on which it purports to rely. In its single reference to the statutory language, the government argues that the distinction between presence and activities is essentially meaningless since "any person admitted to this country must engage in some activity . . ." Brief for Petitioners at 20. The statute, however, is not triggered by *any* activity. It refers only to activities that are "prejudicial to the public

interest, or endanger the welfare, safety, or security of the United States." Thus, the fact that a foreign visitor is likely to engage in a series of innocent activities while in this country—including eating, sleeping and travelling—does not establish a violation of (a)(27). As this Court recently stressed, the "ordinary and obvious meaning of the [statutory language] is not to be lightly discounted." *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4316.

The government also overlooks Congress' use of the active verb "to engage." One engages in activities; one does not engage in the act of being present. The language of (a)(27) is therefore reinforced by its grammatical structure. *Id.* (noting the relevance of "linguistic" principles to statutory analysis). Because neither the language nor structure of (a)(27) supports the government's claim, the government attempts in effect to rewrite the statute. That responsibility belongs to Congress, however, not to the executive branch. *Cf. INS v. Chadha*, 462 U.S. 919 (1983).

After reviewing the language of (a)(27), the district court acknowledged that "[o]n a strictly textual basis, [respondents'] contention is not unpersuasive, for the statutory provision mentions only 'activities.' " Pet. App. at 72a. Similarly, the majority below observed that "[t]he specific reference to activities would be superfluous, indeed, misleading, if entry or presence alone would justify exclusion." Pet. App. at 16a. Judge Bork, as well, noted that "the language of the statute itself, which uses the term 'activities' . . . provides the most persuasive support for the [respondents'] position." *Id.* at 42a. In fact, respondents' statutory argument is irrebuttable.

B. Statutory Context

Section 212(a)(27) does not stand on its own. It is part of a comprehensive legislative scheme designed to identify aliens who are inadmissible to the United States. This context reinforces the significance of the word "activities" in the plain language of (a)(27). *See Erlenbaugh v. United States*, 409 U.S. 239, 241 (1972) ("individual sections of a single statute should be construed together").

Broadly stated, the 33 categories contained in § 212 can be divided into status-based exclusions and conduct-based exclusions. Some examples of the former include the exclusion of aliens who are "insane" or aliens who are drug addicts. 8 U.S.C. §§ 1182(a)(2) and (5). Examples of the latter include the exclusion of aliens who are coming to the United States to engage in prostitution or other immoral sexual acts. 8 U.S.C. §§ 1182(a)(12) and (13).

Of particular relevance here, § 212(a)(28) is clearly a status-based exclusion. The inadmissibility of anarchists and communists under (a)(28) does not depend on the potential commission of any acts within the United States. Anarchists and communists are excludable under (a)(28) because of who they are and regardless of what they do. By contrast, (a)(27) and (a)(29) are conduct-based exclusions. They do not depend on the alien's identity but on the alien's actions.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4316, quoting *Russello v. United States*, 464 U.S. 16, 23 (1983). By reading the words "entry" and "presence" into (a)(27), petitioners lose sight of this important principle.

The government refers in its brief to "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973) (citations omitted).[17] But its adherence to the rule is curiously selective. Thus, the government is untroubled by the fact that its construction of (a)(27) both ignores critical language and overlaps (a)(28). At the same time, it argues that (a)(27) implausibly duplicates (a)(29) unless it embraces entry and presence.[18]

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17 Brief for Petitioners at 20.

18 *Id.*

The relationship between (a)(27) and (a)(29) is not nearly as obtuse as the government suggests. Both refer to activities; however, the reference in (a)(27) is general and the reference in (a)(29) is specific. In other words, (a)(29) is a statute that deals primarily with espionage and sabotage. Other activities that may be prejudicial to the public interest but do not fit as neatly within our criminal law categories fall under (a)(27). For example, the government relied on (a)(27) when it sought to exclude a Libyan student who was studying aircraft maintenance in the United States. *El-Werfalli v. Smith*, 547 F.Supp. 152 (S.D.N.Y. 1982). His activities could not be classified as espionage or sabotage but they were prejudicial nonetheless to American interests. Section 212(a)(27) applies in these instances. Fairly read, it complements (a)(29). As distorted by the government, it nullifies the restrictions placed on (a)(28) by the McGovern Amendment.

C. Legislative History

The government's effort to buttress its interpretation of (a)(27) through selective quotations from the legislative history does not withstand scrutiny. Placed in proper context, even the government's excerpted statements support the view that the enactment of (a)(27) was prompted by a congressional concern with prejudicial *activities* and, more specifically, with prejudicial activities by foreign visitors who enter the United States under diplomatic cover. At most, it can be said that the legislative history "tugs in more than one direction." Pet. App. 17a.

The existence of legislative ambiguity, however, does not aid the government's cause. Given the use of the word "activities" in (a)(27), and the ordinary meaning normally given to that word, the government must demonstrate "clear evidence" that Congress intended to exclude foreign speakers from the United States under (a)(27) even in the absence of any reason to believe that the excluded foreign speakers are likely to engage in prejudicial "activities" if admitted to this country. *See Consumer Product Safety Commission v. GTE Sylvania, su-*

pra; INS v. Cardoza-Fonseca, supra. The government not only fails to meet that burden, it fails even to acknowledge it.

The legislative history of (a)(27) itself is sparse and unilluminating. Its language is taken almost verbatim from Section 22(1) of the Internal Security Act of 1950, Pub. L. No. 831, 64 Stat. 987, 1006,[19] and Congress offered little explanation for its action beyond its desire to "incorporate" the provisions of this predecessor statute. S. Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 30 (1952). The parties therefore agree that the history of the 1950 Act is relevant to the issue now before this Court. The parties disagree sharply, however, on what that history reveals.

The government bases its case entirely on the use of the word "entry" in two Senate reports accompanying the 1950 Act. Brief for Petitioners at 21. The government neglects to provide the context in which the word "entry" appears. Specifically, the passage cited by the government reads in full, as follows:

> Under existing law, among the excludable aliens are certain aliens who seek to enter the United States whose entry would be prejudicial to the public interest or would endanger the safety of the United States. The committee has broadened the class of excludable aliens who seek to enter the United States to engage in activities which would endanger the welfare of the United States.

S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950).[20]

The government singles out the word "entry" from the first sentence and "broaden" from the second sentence to build its argument that Congress intended to exclude aliens whose entry, standing alone and without reference to any anticipated activi-

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19 Section 22(1) of the Internal Security Act mandated the exclusion of "[a]liens who seek to enter the United States solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States." This language was retained in Section 212(a)(27) of the 1952 Immigration and Nationality Act with the addition of the word "security" to the final clause.

20 Precisely the same language appears in S. Rep. No. 2369, 81st Cong., 2d Sess. 10 (1950), also cited by the government. The reference to "existing law" refers primarily to the Act of June 20, 1941. *See* pp. 20-21, *supra*.

ties, would be prejudicial to the public interest. This argument collapses when the two sentences are read together. The "broaden[ing]" that took place in 1950 was the addition of the word "welfare" to the statutory language, not the elimination of the requirement for prejudicial activities. Once that is understood, it becomes clear that the aliens whose "entry" was barred by the 1950 Act were those aliens who sought entry to engage in activities prejudicial to the public interest, safety or welfare of the United States. *See also* H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950).

This interpretation is reinforced by the comments of Senator McCarran, who sponsored both the 1950 and 1952 Acts. Upon introducing § 22 of the Internal Security Act, Senator McCarran explained that the provision was designed "to provide for the exclusion and deportation of all aliens, irrespective of status, if they seek entry to engage or engage after entry in activities endangering the public safety." 96 Cong. Rec. 14179 (1950).

His specific concern, repeated over and over throughout the congressional debate, focused on those "in diplomatic status [who] seek to enter the United States to engage in or are caught engaging in espionage, sabotage, or other *overt acts* endangering the public safety." *Id.* (emphasis added). Under then existing law, such aliens could neither be excluded nor deported from the United States. Section 22 was designed to close that loophole. *Id.* at 14172-73, 14441-42, 14551-52. There is no indication in Senator McCarran's remarks, or in any other portion of the congressional debate, that § 22(1) of the Internal Security Act was intended to reach aliens who did not engage in "overt acts" endangering the public safety.

Moving backward in time, the government next seeks to find the "clear evidence" of congressional intent it requires in the legislative history surrounding passage of the Act of June 20, 1941. Pub. L. No. 113, 55 Stat. 251. Once again, however, the government's historical references are incomplete and misleading. Significantly, the government relegates the text of the 1941 Act to a footnote in its brief. Brief for Petitioners at 21 n.10. This is hardly surprising, since the 1941 Act, like the 1950 and

1952 Acts that followed, referred to "activities" in the United States.

It provided in relevant part:

> [W]henever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa . . . .

The Senate Report accompanying the bill was only two pages long. S. Rep. No. 386, 77th Cong., 1st Sess. (1941). As Judge Bork recognized below, the principal explanation for the bill was contained in a supporting letter submitted by the Attorney General. Pet. App. 41a. Like the government, however, Judge Bork only quotes part of the Attorney General's letter.

The letter indeed begins with a reference to the 1941 bill as one which authorizes visa denials for "aliens whose entry into the United States would endanger the public safety." S. Rep. No. 386, *supra*, at 1. But that summary description is more fully explained in a subsequent paragraph from the Attorney General's letter that neither the government nor dissent below cites. It states:

> The bill under consideration would authorize and empower consular and diplomatic officers of the United States to deny a visa or other travel document to an alien seeking admission into the United States if such officer knows or has reason to believe that the alien wishes to enter the United States for the purpose of engaging in activities which would endanger the public safety.

Id. at 2.

In 1948, Congress granted equivalent authority to immigration officers so that aliens who misrepresented their purpose in coming to the United States when interviewed abroad could, nonetheless, be stopped at the border. Act of May 25, 1948, Pub. L. No. 552, 62 Stat. 268. According to the Senate Report

accompanying the 1948 legislation, "[t]he purpose of this bill is to give the Attorney General the same power to exclude aliens who might be coming to the United States for the purpose of engaging in *activities* which would endanger the public safety as is presently vested in the Secretary of State . . ." S. Rep. No. 1199, 80th Cong., 2d Sess. 1 (1948) (emphasis added).

Likewise, a supporting letter from the Justice Deparment in 1948 describes the 1941 Act, upon which the petitioners so heavily rely, as one that permits the State Department to deny visa requests when it has "reason to believe that an alien seeks to enter the United States for the purpose of engaging in *activities* which will endanger the public safety . . ." H.R. Rep. No. 1286, 80th Cong., 2d Sess. 2 (1948) (emphasis added).

Finally, it is worth noting that the Senate Report accompanying the Internal Security Act of 1950 described the 1941 Act in similar terms. In the very process of building upon the 1941 Act, Congress specifically noted that it "grants to any American diplomatic or consular officer authority to refuse the issuance of a visa to any alien whom he knows or has reason to believe seeks to enter the United States for the purpose of engaging in *activities* that will endanger the public safety." S. Rep. No. 2230 at 19 (emphasis added).[21]

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21 On the eve of World War II, President Roosevelt issued a proclamation authorizing the exclusion of any alien whose "entry would be prejudicial to the interests of the United States . . . ." *See* Presidential Proclamation No. 2523, 6 Fed. Reg. 5821, 5822 (1941). At various times, the government has suggested that (a)(27) must be construed in light of this proclamation. Belatedly but wisely, the government has apparently abandoned that argument here. Roosevelt's proclamation was based on a statutory provision that expressly authorized restrictions on aliens during wartime "in addition to those otherwise provided by law." Act of June 21, 1941, Pub. L. No. 114, 55 Stat. 251, 252. This enactment would not have been necessary if Congress believed the same authority was conferred by the 1941 Act cited by the government. Moreover, the proclamation itself opens proclamation itself opens by referring to "the exigencies of the present international situation and [needs] of the national defense." There is no reason to suppose, and nothing in the legislative history to suggest, that Congress intended to extend this wartime measure when it adopted (a)(27). Significantly, Roosevelt's proclamation is not even mentioned in the survey of relevant immigration restrictions contained in the extensive Senate report on the Internal Security Act of 1950. S. Rep. No. 2230, *supra*, at 16-19.

Respondents readily concede that it is possible to find isolated references to "entry" or "presence" in the legislative history relevant to this case. The point of reviewing legislative history, however, is not to seek out isolated words but to determine congressional intent based on a fair reading of the full history. In virtually every instance in which the government has been able to locate the words "entry" or "presence" in the legislative history, Congress has gone on to explain, in the following sentence or paragraph, that its concern about entry or presence was tied to the likelihood that the excluded foreigner would engage in prejudicial activities if admitted to the country. By parsing the language, the government separates it from its context. Read in context, the legislative history offers little or no support for the government's claim that the reference to "activities" in the language of § 212(a)(27) should be disregarded by the courts as either inadvertent or meaningless.

D. Administrative Construction

Citing *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), the government contends that this Court should defer to what it describes as an administrative practice applying (a)(27) on the basis of mere "entry" or "presence." That contention is flawed for two fundamental reasons. First, this Court has recently reaffirmed that issues of statutory construction remain committed to the judiciary, even after *Chevron*. *See INS v. Cardoza-Fonseca, supra*. Second, the record does not support the government's claim of a consistent administrative practice. To the contrary, the most contemporaneous and authoritative administrative interpretations of (a)(27) highlight the significance of the word "activities" in the statutory language.

This Court's decision in *Cardoza-Fonseca* is particularly instructive. The resolution of that case turned on an interpretation of the phrase "well-founded fear of persecution" in the Refugee Act of 1980, 8 U.S.C. § 1101(a)(42). The government asserted that an alien seeking asylum under the Act was required to show a clear probability of persecution. It further-

more contended that its interpretation of the statute was entitled to deference under *Chevron* as long as it was reasonable.

In an opinion joined by five members of the Court, Justice Stevens expressly rejected that approach. Referring to the government's claim that the asylum standard should coincide with the clear probability standard for withholding deportation, Justice Stevens wrote: "The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide." 55 U.S.L.W. at 4320. *Chevron*, the Court explained, is relevant to the "quite different . . . question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts." *Id.*

Here, the question of whether the word "activities" in § 212(a)(27) embraces "entry" or "presence" is akin to the question of statutory interpretation presented in *Cardoza-Fonseca* and reserved to the courts. The secondary question of whether particular foreign visitors are likely to engage in prejudicial activities if admitted to the United States is not presented by this record since the government has made no allegation of prejudicial activities in any of these cases apart from the concern over entry or presence.

The government's related claim that additional deference is due in foreign policy cases is also undercut by *Cardoza-Fonseca*. The decision to grant political asylum based on a well-founded fear of persecution in the country of origin has potential foreign policy consequences that are at least as severe as the decision to admit a foreign speaker for a lecture tour. *Cardoza-Fonseca* illustrates, however, the importance of distinguishing between the foreign policy consequences of a particular decision and the determination whether that decision is authorized by statute. Administrative judgments are entitled to deference in the former instance but not the latter.

As this Court explained last Term in *Japan Whaling Ass'n v. American Cetacean Society*, 106 S.Ct. 2860, 2866 (1986):

> We are cognizant of the interplay between these [statutes] and the conduct of the Nation's foreign relations, and we

> recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

In any event, the record in this case does not reveal a consistent administrative practice entitled to deference. Most importantly, the government's review of past administrative practice omits any mention of relevant decisions interpreting (a)(27) by the Justice Department's Board of Immigration Appeals. These decisions are entitled to significant weight, both because they are closer in time to passage of the 1952 Act than the State Department examples offered by the government and because Congress has specifically declared that rulings by the Attorney General "with respect to all questions of law [under the Act] shall be controlling" on the State Department. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 35 (1952). *See also* 8 U.S.C. § 1103(a).

As a specific example of this general principle, the above-cited House Report notes:

> [R]ulings which may be issued by the Attorney General relating to those provisions of the bill governing the admissibility of aliens will be controlling with respect to a determination of aliens who are admissible and will be binding on the Secretary of State with respect to determinations of whether an alien is eligible for a visa.

Id.

Matter of M—, 5 I. & N. Dec. 248 (BIA 1953), represents the earliest "controlling" ruling by the Attorney General on the meaning of (a)(27). The government in that case was rebuffed in its effort to exclude an English pacifist from the United States only one year after (a)(27) was adopted. The Board stressed that,

> [t]he unpopularity in the United States of the views advocated by a person seeking admission would appar-

> ently not be a test [under (a)(27)] as to whether admission of that person would be prejudicial to the public interest . . .

Id. at 252. The Board furthermore found that the alien's political views provided "no reason to believe that he will engage even incidentally in activities prejudicial to the public interest." *Id.* at 254. Absent such evidence, the Board ordered the government to issue a visa. *Id.*

Five years later, in *Matter of Zamora*, No. A-105 50 431, unreported (BIA March 11, 1958), the Board again rejected the government's reliance on (a)(27) to exclude a pacifist whose political views allegedly disagreed with American foreign policy objectives. In the intervening years, the Board has never retreated from its insistence on prejudicial activities under (a)(27).

Thus, in *Matter of McDonald and Brewster*, 15 I. & N. 203 (BIA 1975), the Board refused to apply (a)(27) to two aliens who were arrested for importing marijuana into the United States. Although the facts are distinguishable, the Board's reasoning applies with equal force to the ideological visa denials at issue in this case. The Board wrote:

> [S]ection 212(a)(27) was designed to exclude aliens who seek to enter solely, principally, or incidentally to engage in activities inimical to the internal security of the United States . . . While the importation for personal use of several marijuana cigarettes may be prohibited by law, it is not an activity which is inimical to the internal security of the United States.

Id. at 205.[22]

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22 In *Matter of Rivero-Diaz*, 12 I. & N. 475 (BIA 1967), the Board sustained an exclusion under (a)(27) upon a finding that the alien sought entry "solely, principally, or incidentally to engage in activity prejudicial to the public interest." *Id.* at 478. Respondents are unaware of any BIA decision upholding an (a)(27) exclusion based on the government's claim that the alien's entry or presence in the United States was prejudicial, without anything more.

The government's attempt to establish a consistent administrative interpretation of (a)(27) that embraces mere "entry" or "presence" rests on two documents. Brief for Petitioners at 23-24. First, the government refers to a series of illustrative examples under (a)(27) contained in the Foreign Affairs Manual prepared by the State Department for its consular officers. The government does not mention that these examples are introduced with a disclaimer that states: "It was the intent of Congress that the provisions of paragraph (27) of Section 212(a) of the Act be used to safeguard the safety of the United States. They must not be used as 'catch-all' provisions for refusing visas in cases which do not fit in other paragraphs of Section 212(a)." Foreign Affairs Manual, Pt. II, § 41.91(a)(27), reprinted in Gordon and Rosenfeld, 6 *Immigration Law and Procedure*, 32-214, 215 (1983).

Moreover, the four illustrative examples provided in the Foreign Affairs Manual hardly offer a ringing endorsement of the government's interpretation of (a)(27). They include aliens who might engage in conspiratorial activities against the United States while in the country, aliens who are known members of terrorist organizations, aliens associated with underworld criminal organizations, and alien officials who engaged in physical brutality while in political power. *Id.* It belabors the obvious to point out that none of these examples are even remotely relevant to the present case, nor has the government claimed such extreme provocation for its visa denials.

Furthermore, three of the examples clearly turn on the likelihood of prejudicial activities in the United States. Ignoring this, the government focuses exclusively on the final example in the Foreign Affairs Manual, which purportedly anticipates visa denials based solely on an alien's past activities. The government claims, in addition, that this interpretation of (a)(27) was applied in 1959 to exclude a former Nazi officer from the United States. Pet. App. 21a.

A single exclusion in 35 years under the Immigration Act does not establish a consistent administrative practice. And the fact that it concerns a former Nazi officer is significant. Congress has repeatedly indicated its special concern about

providing a haven for individuals who collaborated with the Nazi regime. *See* 8 U.S.C. § 1182(a)(33). The exclusion of a Nazi, therefore, says little or nothing about Congress' general attitude toward (a)(27).[23]

The government also relies on a 1977 opinion by the Office of Legal Counsel of the Department of Justice that upheld application of (a)(27) to six Rhodesians who sought to enter the United States to promote agricultural trade with Rhodesia by attending an international conference of agricultural producers in Washington, D.C. Brief for Petitioners at 24. The first half of the opinion characterizes the creation of business contacts and the making of deals within the United States as a prohibited activity under both (a)(27) and United Nations Security Council Resolution 253 (May 29, 1968).[24] 1 Op. Off. Legal Counsel 64, 66-70 (1977). The second half of the opinion does go on to state that (a)(27) can be triggered by mere entry, but it makes two critical concessions in that regard. First, it acknowledges, as it must, that the language of (a)(27) "speaks . . . of the nature of the activities in which the alien seeks to engage after entering the United States." *Id.* at 71. Second, it reports that past administrative practice under (a)(27) has not been nearly as consistent as the government now contends. According to the OLC opinion:

> The Department of State has suggested that some memoranda and correspondence from 1959 to 1962 relating to the efforts of a certain alien to enter the United States may demonstrate an administrative interpretation that an alien could not be excluded solely on the ground that the circumstances surrounding his entry render all subsequent

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23 In the proceedings below, the government cited two other examples of (a)(27) exclusions that were allegedly based on mere "entry" or "presence." However, as the Court of Appeals pointed out, the explanation for these visa denials actually pointed to the projected "activities" of the excluded aliens in the United States. Pet. App. 20a n.11.

24 Interestingly, the Security Council Resolution, in language reminiscent of (a)(27), barred "any *activity* . . . calculated to promote the export of any commodities to Southern Rhodesia" (emphasis added).

> activities "prejudicial to the public interest" or a danger to the security of the United States.

Id. at 72.

This historic view of the State Department is supported by a declaration in the record submitted by Leonard C. Meeker, who served as a legal advisor in the State Department for twenty-three years and as Chief Legal Advisor from 1965 to 1969. According to Mr. Meeker, "[s]ubsection 27 was understood during my service with the Department to be the basis for denying visas to aliens whose anticipated activities in the United States would create dangers to this country of a gravity comparable to espionage and sabotage."[25]

The Justice Department took a similar pre-litigation position on (a)(27). In a memorandum prepared only a few months prior to the commencement of this action, the Justice Department wrote: "The law as framed seems to permit findings of ineligibility under this section only as to persons whom we have reason to believe intend to engage in proscribed activities."[26]

At best, therefore, the government can offer only "scattered rulings . . . not consistently of one pattern," *Kent v. Dulles* 357 U.S. 116, 128 (1958), in support of its statutory interpretation of (a)(27). Under these circumstances, administrative deference is neither appropriate nor required. As this Court noted in *INS v. Cardoza-Fonseca*, 55 U.S.L.W. at 4320 n.30:

> An additional reason for rejecting the Government's request for heightened deference to its position is the inconsistency of the position [it] has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view. *Watt v. Alaska*, 451 U.S. 259, 273 (1981); see also *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

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25 C.A. App. A251-52.

26 Memorandum on Technology Transfers under the Immigration and Nationality Act, Department of Justice (March 1, 1982). C.A. App. A189.

Nor can the government redeem its statutory interpretation in the absence of evidence by arguing that it has been presented with few opportunities for applying (a)(27) since its enactment in 1952. *Cf. Haig v. Agee*, 453 U.S. 280, 303 (1981). By the government's own admission, 519 visa applications were denied under (a)(27) during the 20 year period from 1963 to 1983. Brief for Petitioners at 6 n.2. Other applications were certainly denied under (a)(27) before 1963 and after 1983. Nevertheless, the government offers this Court only one example of a vsia denial under (a)(27) based on mere "entry." Surely more is required to establish an administrative interpretation so clearly at odds with the language of the statute itself. For similar reasons, such a sparse record cannot support a claim of congressional acquiescence. *See Kent v. Dulles*, *supra*. Indeed, both the majority and dissent below agreed on this point. Pet. App. 21a, 46a.[27]

E. Case Law

Respondents are aware of two other decisions interpreting the scope of § 212(a)(27). *Allende v. Shultz*, 605 F.Supp. 1220 (D.Mass. 1985), is most closely on point. Plaintiffs in *Allende* challenged the government's refusal to grant a nonimmigrant visa to Hortensia de Allende, wife of the slain Chilean president. Ms. Allende had been invited to address a series of groups around the country "on issues of common concern." *Id.* at 1222. The government denied her visa under (a)(27) on the ground that she was a member of the World Peace Council and that her presence in the United States would be prejudicial to the public interest. *Id.*[28] The district court rejected the government's motion for summary judgment, holding that

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27 Because respondents were denied any discovery, there is no way of knowing whether the government's interpretation of (a)(27) is contradicted by other evidence in its own files, including evidence of contrary congressional intent or administrative practice. Thus far, the government has presented only the evidence it deemed helpful to its case. Even that one-sided presentation, however, is plainly insufficient.

28 This is precisely the same justification offered by the government for its refusal to grant Nino Pasti a visa in the present case.

Mrs. Allende's affiliation with the WPC was relevant to (a)(28) but not, "in itself, a 'facially legitimate and bona fide' reason for her exclusion under subsection (27)." *Id.* at 1225.

In *El-Werfalli v. Smith*, 547 F.Supp. 152 (S.D.N.Y. 1982), the district court upheld a visa denial under (a)(27). It did not rule that mere "entry" or "presence" is sufficient to trigger the statute. Rather, the court held that the United States government acted within its power under the statute in excluding a Libyan student whose purpose in entering the country was to learn to repair airplanes in a way that could later be useful to the Libyan Air Force. The exclusion, moreover, was pursuant to a consistent government policy "concerning the training of personnel able to aid the operation of Libyan aircraft." 547 F.Supp. at 154.

The distinction between *El-Werfalli* and this case is obvious. Obtaining specialized skills that can serve the military forces of a hostile government may well represent a prejudicial "activit[y]" within the meaning of (a)(27). It does not follow, however, that a foreign speaker discussing public issues of manifest importance to the American public is likewise engaged in a "prejudicial activity." The two situations are worlds apart in a constitutional democracy. It cannot be presumed that Congress forgot this distinction when it enacted (a)(27).

F. Congressional Intent

In the final analysis, the government's interpretation of (a)(27) does not rest on any of the traditional methods of statutory construction but rather on an administrative redrafting of the statutory language, which it ultimately justifies by the need to respond to a worst-case scenario.

Specifically, the government argues that a broad interpretation of (a)(27) is necessary to preserve the government's power to respond to situations like the one presented by the application of the late Shah of Iran to enter the United States for medical care after his fall from power. Brief for Petitioners at 20. As the district court noted: "The mere entry of the Shah into the United States and his presence in this country had the

most serious consequences for the United States . . ." Pet. App. 730.

That observation is incontestable. But it does not lead to the government's conclusion that Congress must have intended § 212(a)(27) to mean what it clearly does not say and what neither its legislative history nor administrative construction support—that "the distinction between an alien's activities and his presence in the United States is one without a difference." Brief for Petitioners at 20. *Cf. Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 342 (1983) (rejecting statutory construction claim based on a "parade of horribles"); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 283-84 (1980).

An additional answer to the government's concern is that Congress conferred the necessary authority on the executive branch to deal with the Shah's application for admission, but not in (a)(27). As the Court of Appeals noted, Pet. App. 6a, n.2, that authority can be found in § 212(f) of the Act, 8 U.S.C. § 1182(f), which provides:

> Whenever the President finds that the entry of any aliens or class of aliens into the United States would be detrimental to the best interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

See Mow Sun Wong v. Campbell, 626 F.2d 739, 744 n.9 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (holding that the President is empowered under § 212(f) "to prevent the entry of any alien or group of aliens . . .").

The use of the word "entry" in § 212(f) is particularly significant. It demonstrates, beyond doubt, that Congress knew how to distinguish between "entry" and "activities" when it drafted § 212. Contrary to the government's contention in this case, therefore, it must be assumed that Congress' use of the word "activities" in (a)(27) was both deliberate and meaningful.

The government also overlooks § 215 of the Immigration and Nationality Act, 8 U.S.C. § 1185(a)(1), which empowers the President to "prescribe" additional "limitations" on the entry of "any alien" into the United States. This specific authority was utilized by President Carter during the Iranian hostage crisis. *See* Executive Order 12172, 44 Fed. Reg. 67947 (1979), *amended by* Executive Order 12206, 45 Fed. Reg. 24101 (1980).[29]

In short, there is no reason or need to distort the plain meaning of (a)(27) in order to safeguard interests that Congress has already protected in other provisions of the Immigration and Nationality Act.

II. THE McGOVERN AMENDMENT PROHIBITS THE USE OF § 212(a)(27) TO EXCLUDE FOREIGN SPEAKERS BASED ON THEIR MEMBERSHIP IN PROSCRIBED ORGANIZATIONS

The McGovern Amendment was adopted by Congress in 1977 to "achiev[e] greater United States compliance" with the Helsinki Accords and to "encourag[e] other signatory countries to comply with [its] provisions." 22 U.S.C. § 2691(a). The Helsinki Accords are intended, *inter alia*, to "facilitate wider travel" across national borders. 22 U.S.C. § 2691(a).[30] Permitting the use of § 212(a)(27) to exclude foreign speakers on a theory of guilt by association with proscribed organizations would violate the letter and spirit of both the Helsinki Accords and the McGovern Amendment. Yet, that is precisely the argument made by the government in this case.

Unfortunately, the majority and dissenting opinions below became tangled in a linguistic squabble over whether the reasons for exclusion under (a)(27) must be "independent of,"

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29 In his dissent below, Judge Bork argues that the requirement of presidential involvement in both §§ 212(f) and 215 represents "diplomatic overkill." Pet. App. at 60a. In fact, it serves as a healthy guarantee that the First Amendment rights of American citizens will not be lightly cast aside in cases like this. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976). By contrast, § 212(a)(27) can be triggered by any consular officer.

30 *See* Conference on Security and Co-operation in Europe: Final Act (Aug. 1, 1975), 14 I.L.M. 1292, 1314 (1975).

or may be "in addition to," the sort of organizational ties directly addressed by (a)(28). In and of itself, this semantic dispute is not particularly significant. What is significant is the underlying principle that an exclusion under (a)(27)—even assuming that (a)(27) reaches "entry" or "presence"—must rest on specific facts about a specific individual and cannot be based on a generalized inference drawn from organizational membership. On this key point, the majority and dissent agree. As Judge Bork explained: "The presumption that all members of [proscribed] groups, for that reason alone, ought to be excluded was rejected by the Congress that enacted the McGovern Amendment." Pet. App. 50a.

The government correctly points out that the McGovern Amendment does not mandate the admission of any alien. Its impact is nonetheless substantial. Prior to the Amendment, any alien affiliated with a communist organization was presumptively excludable under (a)(28). A waiver was available but it could be granted or denied at the unfettered discretion of the Attorney General. 8 U.S.C. § 212(d)(3). The McGovern Amendment alters the bureaucratic dynamic dramatically. Under its provisions, the Secretary of State must recommend a waiver of excludability for any alien denied admission because of organizational affiliation, or else certify to Congress that national security is at stake. 22 U.S.C. § 2691(a). The Attorney General may reject the Secretary of State's recommendation. But, as the Court of Appeals noted, he is unlikely to do so except in extraordinary circumstances. Pet. App. 28a, n.22.

In 1978, the McGovern Amendment was modified by Congress in response to the concern of "many Americans" that its terms had made it easier for terrorists to enter the country. S. Rep. No. 95-842, 95th Cong., 2d Sess. 17 (1978). Congress was understandably anxious to correct that misimpression. Accordingly, it stipulated that the McGovern Amendment should not "be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization." 22 U.S.C. § 2691(a).

The government seizes on this language to argue that the McGovern Amendment does not apply to an alien who is otherwise excludable under (a)(27). It is a circular argument that misses the point. No one contends that the McGovern Amendment applies to aliens who are properly excludable under (a)(27). The question is whether the government can circumvent the McGovern Amendment by using (a)(27) to exclude foreign speakers based on inferences drawn from their organizational memberships.

The relevance of the McGovern Amendment to the facts of this case cannot be seriously disputed. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"). As the State Department wrote in a 1983 letter to the Senate describing the certification process:[31]

> While the language of the McGovern Amendment does not, on its face, exclude from the term "security interests" foreign policy interests and considerations, the legislative history makes clear that this was the intent.

Thus, had the exclusions in this case proceeded under (a)(28), even the government agrees that the Secretary of State would have been required by the McGovern Amendment to recommend admission. Instead, the government resorted to (a)(27). This Court cannot approve such a transparent tactic to achieve an end run around the McGovern Amendment. *See Allende v. Shultz*, 605 F.Supp. at 1225 n.2.

The McGovern Amendment was introduced in the House by Representative Fascell, who began the debate by stating:

> We have the strength and wisdom to accommodate many visitors in this country even if a few do not share the

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31 Letter of Alvin Paul Drischler, Acting Ass't Secretary of State for Legislative and Intergovernmental Affairs to Vice President George Bush, in his capacity as President of the Senate, dated October 18, 1982, at 2. A copy of this letter, which is part of the record below, has been lodged with the Clerk of this Court.

> mainstream of American thought, as long as they are not here to throw bombs or to do harm to our citizens.

123 Cong. Rec. 26536 (1977).

He then assured the House that the McGovern Amendment did not restrict the legitimate authority of the executive branch to exclude specific individuals who truly threaten national security:

> There are those instances, and many of us know about them in detail, when there are very good reasons to deny entry to the United States to a person who presents a true danger through terrorism, because he is a committed anarchist, or he interprets his commitment to Communist ideology as a genuine license for destructive activities within our borders.

Id. See also S. Rep. No. 95-842, *supra*, at 17.

The allegations raised by the government in this case are fundamentally different in nature. They do not focus on the individual but rather on the organization to which the individual belongs. This is most apparent in the case of Nino Pasti, the former NATO general. The government charges that Mr. Pasti is a member of the World Peace Council, that the World Peace Council is "controlled and financed" by the Soviet Union, and that the Soviet Union had embarked on a propaganda campaign in the fall of 1983 to discourage deployment of American Pershing missiles in Western Europe. Pet. App. 92a-93a.

There is no claim in the government's affidavits that Nino Pasti was himself engaged in a propaganda campaign directed by the Soviet Union. To the contrary, the government asserts that he was excluded as part of a general policy to exclude all WPC members, "except in limited circumstances." *Id.* The government alleges in its brief that Mr. Pasti is an "undisclosed" agent of the Soviet Union. Brief for Petitioners at 31. But there is no indication in any of its affidavits that this allegation is based on anything more than Mr. Pasti's membership in the World Peace Council.

The government is similarly ambiguous in explaining its refusal to admit Ms. Finlay and Ms. Lezcano to the United States in September 1983. Again, however, the principal emphasis seems to be on their organizational affiliation rather than their individual characteristics or likelihood to engage in prejudicial activities. Thus, the Eagleburger affidavit begins by noting that both Ms. Finlay and Ms. Lezcano are officials of the Federation of Cuban Women (FMC). Pet. App. 89a. The government then claims that people "like" Ms. Finlay and Ms. Lezcano are "routinely" employed by the Cuban government to promote a positive image of Cuban society among American groups. *Id.* at 89a-90a. Neither in the Eagleburger affidavit or elsewhere, however, does the government suggest any reason to believe that Ms. Finlay and Ms. Lezcano were actually employed for that purpose in September 1983 or, indeed, at any other time.

Instead, the government switches gears and argues that Ms. Finlay and Ms. Lezcano were excluded in September 1983 because their visa applications were accompanied by a "diplomatic" passport and Cubans travelling on a diplomatic passport are, as a matter of policy, denied admission to the United States unless they are participating in the work of international organizations such as the United Nations, or engaged in bilateral discussions with the American government. *Id.* at 90a-91a. In fact, Ms. Finlay and Ms. Lezcano were travelling with a so-called "official" passport that is used by many non-diplomats, including artists and academics (J.A. 98-99; 102).[32] Thus, at the very least, there is reason to suspect that the actual

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32 If the government seriously believed that Ms. Finlay and Ms. Lezcano were Cuban officials and excludable for that reason, it would surely have made some reference in its brief to President Reagan's 1985 proclamation suspending the entry of Cuban officials into the United States. *See* Presidential Proclamation No. 5377, 50 Fed. Reg. 41329 (1985). One reason that it may not have mentioned the 1985 proclamation is that its effort to link the FMC with the Cuban government has already been rejected by at least one immigration judge. *See* n.9, *supra*.

As the Court of Appeals further noted, the fact that this proclamation was issued pursuant to § 212(f) of the Immigration and Nationality Act, 8 U.S.C. § 1182(f), supports respondents' contention that our national interest can be adequately protected without distorting the meaning of § 212(a)(27).

basis for the exclusion of Ms. Finlay and Ms. Lezcano rests where the government initially placed it—with their membership in the FMC, a proscribed organization under (a)(28) but not, without more, a basis for exclusion under (a)(27).

Upon reviewing this evidence, the Court of Appeals concluded that it did not "comprehend any basis for claiming that these two visa applicants have governmental affiliations independent of their membership in subsection (28) organizations." Pet. App. 29a, n.23. Likewise, the Court of Appeals observed that Mr. Pasti's exclusion appears to rest "solely and simply in [his] participation in the World Peace Council, an organization clearly covered by subsection (28) and the McGovern Amendment." *Id.* Finally, the Court of Appeals noted that Tomas Borge had previously been offered a visa to travel and speak within the United States despite his rank as Interior Minister of Nicaragua and that the government's basis for reversing that decision in November 1983 could not clearly be discerned from the submitted affidavits. *Id.* at 28a.

Beyond this failure of proof, the government's attempt to establish a link between the foreign speakers excluded in this case and hostile foreign governments reflects, once again, its fundamental misunderstanding of (a)(27). *See* Point I, *supra*. The threshold requirement of prejudicial "activities" in (a)(27) cannot be ignored even for foreign officials. If the government wishes to exclude foreign officials based on mere "entry" or "presence" it may use (a)(28) and comply with the McGovern Amendment, issue an appropriate proclamation under §§ 212(f) or 215, or petition Congress to enact a new exclusion provision. It may not rely on (a)(27), which simply does not confer the authority claimed by the government even on its reading of this factual record.[33]

The Court of Appeals accordingly remanded to the district court with instructions to reexamine the record in an effort to determine whether these particular foreign speakers were denied admission to the United States for reasons unique to them as individuals or for reasons precluded by the McGovern

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33 Of course, the government is under no obligation to meet with visiting dignitaries or extend them any official privileges. Indeed, the government is free to condemn their political views, if it so chooses.

Amendment—namely, their membership in mass organizations that our government believes are affiliated with a foreign communist party. *See* § 212(a)(28)(C).[34]

Echoing Judge Bork, the government objects to the majority's interpretation of the McGovern Amendment on the ground that it grants favored treatment to communist organizations. Brief for Petitioners at 31. Specifically, the government contends that since (a)(28) only reaches communist organizations, only communist party members are protected from exclusion under (a)(27) by the majority's view of the McGovern Amendment.

This reasoning is flawed on two grounds. First, Congress might easily have concluded that communist organizations require special protection under the McGovern Amendment precisely because (a)(28) has singled them out for *disfavored* treatment, as the Court of Appeals observed. Pet. App. 27a, n.21. Second, the decision below does not immunize communists from exclusion under (a)(27); it simply requires a nexus between the excluded individual (communist or not) and his projected *activities* in the United States. The McGovern Amendment takes exactly the same approach in requiring an individual certification to Congress whenever the Secretary of State recommends against a waiver of inadmissibility under (a)(28).

The government also objects to the terms of the remand on the ground that it will involve the courts in sensitive foreign policy judgments that they are not equipped to make. Brief for Petitioners at 33-36. It is an unpersuasive claim. As matters now stand, the district court has been directed to conduct two inquiries in this case.[35] The question of whether the word "activities" in (a)(27) permits exclusions based on "entry" or "presence" is a traditional question of statutory construction.

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34 It is worth emphasizing again that the government has not alleged that any of the excluded individuals in this case are likely to engage in prejudicial activities if admitted to the United States. Respondents are entitled to prevail on that basis alone. *See* Point I, *supra*.

35 Respondents have not opposed the limited remand ordered by the court below, although they believe that the present record is adequate to hold that (a)(27) was improperly applied to the facts of this case.

It can be resolved through judicial analysis and is appropriately within the judiciary's province. *See INS v. Cardoza-Fonseca, supra; Japan Whaling Ass'n v. American Cetacean Society, supra.* To the extent that it involves further examination of past administrative practice under (a)(27), the government itself has opened the door to that inquiry. Pet. App. 22a, n.15.[36]

The second question left open by the remand is whether the government's use of (a)(27) in this case is consistent with the McGovern Amendment. The government implies that this inquiry will place the courts in the position of second-guessing the foreign policy assessments of the State Department. This Court rejected a similar argument in *Cardoza-Fonseca, supra.* The decision below merely insists that the government's factual allegations reflect the congressionally-drawn lines of (a)(27). In that regard, the government has been offered a second opportunity to "reevaluate these visa denials without the statutory misinterpretation that casts doubt on their previous analyses." Pet. App. 30a. It is entitled to no more.

III. THE LANGUAGE OF § 212(a)(27) SHOULD BE NARROWLY CONSTRUED TO AVOID THE FIRST AMENDMENT PROBLEMS INHERENT IN THE GOVERNMENT'S BROAD APPLICATION OF THE STATUTE IN THIS CASE

The constitutionality of § 212(a)(27), as applied in this case, was not reached by the Court of Appeals. Pet. App. 30a, n.24. In a footnote, the government nonetheless asks this Court to decide that critically important question. Brief for Petitioners at 36 n.19. While agreeing that the question is important, respondents believe that the better course would be to permit the issue to be addressed in the first instance by the lower courts. Respondents submit, nonetheless, that the statutory

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36 In addition, the government can, where appropriate, invoke the state secrets privilege, *United States v. Reynolds*, 345 U.S. 1 (1953), as it has already done once in this case. The state secrets privilege, however, does not entitle the government to *rely* on information that it withholds from the adversary process.

construction of (a)(27) must take into account the constitutional problems raised by the government's broad view of the statutory language.[37]

This Court, of course, has never considered the constitutionality of (a)(27). Relying, however, on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the dissent below argues, and petitioners presumably concur, that decisions to exclude foreign speakers under (a)(27) may be "based on the content of an applicant's political beliefs." Pet. App. 61a-62a. Nothing in *Kleindienst* justifies such a dramatic departure from traditional First Amendment doctrine.

The scope of the government's claim is illustrated by its assertion in the district court that (a)(27) authorizes the banning of foreign speakers for no other reason than the speaker's possible impact on domestic political debate.[38] That assertion was flatly rejected by the district court, which held that "an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of the content of his proposed message." Pet. App. 77a. *Accord, Allende v. Shultz*, 605 F.Supp. at 1225.

Kleindienst challenged the government's right to deny a discretionary waiver of excludability to Dr. Ernest Mandel, a Belgian journalist and Marxist theoretician, who was concededly excludable under (a)(28).[39] Dr. Mandel brought suit along with six American professors who had either invited him to speak "or who expected to participate in colloquia with him," 408 U.S. at 759, alleging that the government's action was content-based in violation of the First Amendment. The government asserted, in response, that a waiver had been denied for content-neutral reasons; namely, that Dr. Mandel had violated the terms of his visa on a previous trip by engaging in fundraising activities that had not been authorized. *Id.* at 758.

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37 *See generally* Shapiro, "Ideological Exclusions: Closing the Border to Political Dissidents," 100 Harv.L.Rev. 930 (1987).

38 *See* n.12, *supra*.

39 *Klendienst*, therefore, did not present the question of statutory authority raised by this case.

Given this ideologically neutral explanation, the Court concluded that the government had satisfied its burden of providing a "facially legitimate and bona fide reason," which the courts would neither look behind nor balance "against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770. The Court did not address the constitutionality of (a)(28) itself, or its use by the government to limit speech in this country. To the contrary, the Court ended its opinion with a cautionary admonition that its decision was not meant to foreclose further consideration of the constitutional question that might be presented by a different record. *Id.*

At a minimum, there can be no doubt after *Kleindienst* that the First Amendment protects the right to receive information as well as the right to speak and, therefore, that the refusal to permit foreign speakers to enter this country necessarily affects the First Amendment rights of American inviters. *Kleindienst v. Mandel*, 408 U.S. at 762-63. *See also Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 757 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).[40]

It is also clear that in any other context, the government's asserted right to make content-based judgments would be plainly unconstitutional, especially when motivated by a desire to shape domestic political debate in the government's favor. The principle that government may not discriminate among speakers for ideological reasons lies at the heart of the First Amendment. *Regan v. Time, Inc.*, 468 U.S. 641 (1984); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Department v. Mosley*, 408 U.S. 92 (1972). As the Court said when reviewing the right of school officials to remove library books on ideological grounds: "If petitioners *intended* by their removal decisions to

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40 It does not follow, and respondents never claimed, that any American may secure the admission of any foreigner on First Amendment grounds. The government is free to enforce the immigration laws in a content-neutral fashion. What it may not do is use the immigration laws to structure the content of domestic political debate.

deny respondent access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." *Board of Education v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (emphasis in original). Even more strongly, the *Pico* Court wrote: "Our Constitution does not permit the official suppression of ideas." *Id.*

A long and bitter history has proven that the risk of such censorship is unacceptably high when government officials are granted the power to license speech. Indeed, "[t]he struggle for freedom of [expression] was primarily directed against the licensor." *Lovell v. Griffin*, 303 U.S. 444, 451 (1938). As broadly construed by the government here, § 212(a)(27) is a classic licensing scheme. It is no different in scope or effect than numerous licensing schemes struck down by this Court over the past fifty years because of their impact on speech. *E.g., Hynes v. Mayor of Oradell*, 425 U.S. 610 (1980); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Niemotko v. Maryland*, 340 U.S. 258 (1951); *Thomas v. Collins*, 323 U.S. 516 (1945); *Largent v. Texas*, 318 U.S. 418 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

Nothing in *Kleindienst* suggests that the Court intended to legitimate content-based censorial judgments. Had the Court meant to reject this fundamental postulate of modern First Amendment law, or carve an exception whenever the national borders are involved, it is reasonable to assume that it would have done so expressly. This is especially true since *Kleindienst* was decided only *three days* after *Police Department v. Mosley*, 408 U.S. 92, 95 (1972), which held, in now classic language, that "above all else, the First Amendment means that

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[41]

Properly read, *Kleindienst* is fully consistent with the Court's earlier ruling in *United States v. O'Brien*, 391 U.S. 376-77 (1968), affirming the government's right to punish the burning of a draft card, despite its symbolic aspect, because of the government's "legitimate" and non-ideological interest in maintaining the integrity of the Selective Service System. In both *Kleindienst* and *O'Brien*, the government's action was aimed at conduct, governed by content-neutral standards, and exercised only an "incidental" impact on speech.

Likewise, in *Regan v. Wald*, 468 U.S. 222 (1984), the Court upheld an executive ban on travel to Cuba in a manner entirely consistent with the *O'Brien* distinction between content-based regulations and regulations that have an incidental impact on the content of speech. Specifically, the Court recognized the right of the executive branch to restrict the flow of American currency to Cuba despite its "incidental" effect on the constitutional rights of Americans wishing to travel to that country. Here, the restraint on communication is direct and substantial.

Thus construed, *Kleindienst* does not support the government's claim that granting a visa to certain foreign speakers may send a wrong signal about American foreign policy. To the contrary, there is no ideological message conveyed by an American visa once it is clearly understood that visa decisions cannot be based on ideological grounds. For that reason, this Court has consistently rejected the notion that government can ban speech to avoid the possibility of being identified with it.

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41 The dissent below argues that First Amendment principles must give way in this case to the executive's authority over immigration policies. Pet. App. 61a. *Kleindienst* recognizes, however, that a program of ideological exclusions has important constitutional consequences for American citizens. The line of immigration decisions cited by the dissent, *e.g. Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), is therefore not controlling in this very different context.

See Widmar v. Vincent, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972).[42]

The district court accepted the validity of these First Amendment principles but held that the government's actions in this case were, in fact, content-neutral. Pet. App. 80a. That characterization was repeated by Judge Bork in his dissenting opinion. *Id.* at 62a. It is, at best, an odd and unacceptable notion of content-neutrality.

For example, it is clear from the government's own affidavit that Mr. Pasti's visa was denied because he was a known and credible opponent of American nuclear policy and "his proposed visit coincided with the initial deployment of Cruise and Pershing missiles in certain NATO countries—a particularly delicate period for United States foreign policy." *Id.* at 94a. The fact that the government describes Mr. Pasti's political views as congruent with Soviet propaganda aims, *id.*, does not alter its objection to the content of his anticipated message. By its own admission, the government's concern was that Mr. Pasti's speech, pejoratively labeled as "propaganda," would be favorably received by American audiences and thereby complicate implementation of the Administration's foreign policy objectives.

Similarly, the State Department indicated in a letter that Ms. Finlay and Ms. Lezcano might well have been admitted to the United States if they were coming to speak about sports rather than the status of women. *See* p. 6, *supra*. And the exclusion of Tomas Borge was apparently tied to the claim that one month earlier another Nicaraguan official had visited the

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42 Significantly, the McGovern Amendment was adopted, in part, "to open the way to visits by Eurocommunist leaders and to Communist labor leaders without the executive branch having to make the politically difficult individual decisions which might imply a change in overall U.S. policy." S. Rep. No. 95-194, 95th Cong., 1st Sess. 13 (1977).

In the circumstances of this particular case, it is difficult to conceive that anyone will mistakenly assume that American policy in Central America has suddenly shifted because a Nicaraguan representative is permitted to tour American colleges or that American resolve to place nuclear missiles in Europe has suddenly evaporated because Nino Pasti is permitted to address an American rally.

United States and "publicly advanc[ed]" a series of proposals that were opposed by our government. Pet. App. at 87a.

The use of (a)(27) to limit political debate in this country is inconsistent with core First Amendment values. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966). To eliminate that conflict, the language of (a)(27) should be narrowly construed.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

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